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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949.

No. ~~878~~ 131

FREDA GOODMAN,
Petitioner,

vs.

CITY OF CHICAGO,
a Municipal Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, THIRD DIVISION, AND BRIEF IN SUPPORT THEREOF.

(PETITION FOR LEAVE TO APPEAL DENIED BY SUPREME COURT OF ILLINOIS.)

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

SUMMARY AND SHORT STATEMENT OF MATTER INVOLVED.

On *August 30, 1927*, the petitioner was awarded a judgment in condemnation for $11,500 against the respondent,

City of Chicago, for the taking of her property. In the same suit a special assessment was levied against her property for $1114.40 and on February 27, 1928, a deficiency was levied for $829.10 making a total of $1943.50, which sum was deducted from petitioner's award and she was then paid $9556.50 instead of $11,500.00.

The sum of $1943.50 was to be used for the sole purpose of widening and improving Taylor Street where petitioner's property was located.

Respondent, City of Chicago, admittedly never widened or improved the street.

On December 9, 1946, petitioner filed a suit in the Circuit Court of Cook County, Illinois, for the refund of said sum of $1943.50.

On January 22, 1947, the Circuit Court of Cook County entered an order sustaining petitioner's motion for summary judgment for the sum of $1943.50.

Respondent took an appeal to the Appellate Court of Illinois. While the appeal was pending the respondent first commenced the improvement on *May 20, 1947*. On *October 14, 1947* the improvement was completed.

The Appellate Court reversed and remanded the cause for hearing on the facts as to whether the City of Chicago had abandoned the improvement. The Appellate Court took into account facts occurring after judgment and not a part of the record.

Petitioner contended that a delay of more than 19 years in making an improvement was an abandonment as a matter of law. Petitioner also contended that commencing and completing the improvement *after* petitioner obtained her judgment is no ground for reversing the judgment. The Appellate Court also ordered this case

consolidated with several other cases which were filed after petitioner's case and the court considered matters not present in petitioner's case.

Petitioner moved to strike out the remanding part of the Appellate Court judgment in order to make this order final. That motion was allowed.

Petitioner filed a Petition for Leave to Appeal in the Supreme Court of Illinois which petition was denied on March 22, 1949. This petition for a writ of certiorari is to review the judgment of the Appellate Court.

Opinion Below.

The opinion of the Illinois Appellate Court which petitioner contends is erroneous is reported in 336 Ill. App. 126; 83 N. E. (2d) 23. This opinion is printed in full at the end of this petition as an appendix. The Supreme Court of Illinois denied leave to appeal without comment and without a written opinion.

Jurisdiction.

The basis upon which it is contended that this Court has jurisdiction is:

1. The petitioner has been deprived of property without due process of law in violation of the 14th Amendment to the Constitution. Paying $9556.50 for a $11,500.00 condemnation award is not "just compensation." The City of Chicago in deducting $1943.50 for a specific purpose and then waiting over 19 years without doing the work and retaining the money violated the 14th Amendment to the Constitution of the United States.

2. The action of the City of Chicago violates Section 10, Article I of the Constitution in that it impairs the obligation of a contract. When the City of Chicago deducted $1943.50 from petitioner's award in 1927, it did so for the express purpose and upon the express understanding that the money would be used solely to widen and improve Taylor Street. For 19 years this was not done. The Appellate Court, in effect, held that such conduct was proper and thus impaired the obligation of a contract.

3. Petitioner has been denied the equal protection of the laws of Illinois in violation of the 14th Amendment. In *Woodruff* v. *City of Chicago,* 394 Ill. 542, 69 N. E. (2d) 287, involving the same assessment, the very same street, and similar facts, the Supreme Court of Illinois held that the taxpayer was entitled to a refund. Since *Woodruff* v. *City of Chicago* was decided in 1946 in favor of the property owner, *a fortiori,* a year later where the street was still admittedly unimproved, this petitioner should have been allowed a refund.

Questions Presented.

1. Is 19 years an unreasonable length of time as a matter of law for a City to wait after it takes money from a taxpayer for making an improvement?

2. Is it unconstitutional to deprive a person of a judgment lawfully obtained upon facts or happenings occurring subsequent to judgment?

3. Is a special assessment improvement abandoned after nothing is done for over 19 years? If after a taxpayer sues for refund and obtains a judgment, can the improvement be revived so as to defeat the taxpayer's judgment for refund?

4. Is it constitutional for a City to abandon an improvement for 19 years and then after a taxpayer who has paid a special assessment to make this improvement has obtained a judgment for a refund, to commence and complete the improvement so as to defeat such judgment?

5. Is the payment of $9,556.00 for a $11,500.00 judgment in condemnation "just compensation?"

Why the Writ Should Be Allowed.

1. The decision of the Appellate Court of Illinois (as sustained by the Supreme Court of Illinois) had decided a substantive federal right contrary to the decisions of this court.

2. The decision of the Appellate Court of Illinois introduces a novel and unprecedented principle of judicial review, namely, that matters occurring subsequent to judgment and *dehors* the record, will be considered by a reviewing court.

3. The effect of the decision of the Appellate Court would mean that a municipality may take a taxpayer's money without ever making an improvement until a judgment had been obtained against it.

4. There are numerous other pending cases in Chicago, Illinois, which are awaiting a clear cut decision by this Court as to whether it is constitutional for a municipality to take a taxpayer's money by special assessment for a specific improvement, fail to make the improvement, for 19 years, have a judgment for refund entered against it and then defeat the judgment by subsequently making the improvement.

5. The petitioner has been deprived of "due process," has been denied "just compensation", and the City of Chicago has impaired the obligation of a contract in violation of petitioner's constitutional rights.

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OCTOBER TERM, 1949.

No.

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

A delay of over 19 years in making an improvement constitutes an abandonment as a matter of law and the person who pays a special assessment for such improvement is entitled to a refund.

District of Columbia v. *Thompson*, 281 U. S. 25, 73 L. Ed. 677.

Woodruff v. *City of Chicago*, 394 Ill. 542, 69 N. E. (2d) 287.

Bradford v. *City of Chicago*, 25 Ill. 141 (1861).

McConville v. *City of St. Paul*, 75 Minn. 383, 77 N. W. 993, 443 L.R.A. 587, 74 Am. St. Rep. 508.

II.

Deducting a fixed amount from a condemnation judgment to make an improvement and then abandoning the improvement without refunding the amount deducted, violates the 14th Amendment to the Constitution of the United States and Article II, Section 13, of the Constitution of Illinois, and is not "just compensation."

Village of Norwood v. *Baker*, 172 U. S. 269, 43 L. Ed. 443.

Cohen v. *City of Chicago*, 377 Ill. 221, 36 N. E. (2d) 220.

People ex rel. Wanless v. *City of Chicago*, 378 Ill. 453, 38 N. E. (2d) 743.

III.

Petitioner raised the constitutional issue in the lower court, at the first opportunity in the Appellate Court, and also in the Supreme Court of Illinois (Abst. 19-23).

The Appellate Court in its opinion stated that petitioner made a conditional motion in our brief to transfer the case to the Supreme Court of Illinois on the ground that a constitutional issue was involved. Under Illinois law, only the Supreme Court can decide Constitutional issues. (Section 75, Illinois Civil Practice Act, Chap. 110, Illinois Revised Statutes, 1947.)

The record shows that on November 5, 1947, about six months before briefs were filed in the Appellate Court, petitioner made a motion to transfer the case to the Su-

preme Court of Illinois on the ground that a constitutional issue was involved (Abst. 19-21). This motion was denied by the Appellate Court.

In short, the petitioner raised the constitutional issue at the earliest opportunity as the transcript of record discloses.

Conclusion.

Petitioner submits that a grievous injustice has been done her. Basic constitutional principles have been violated. Petitioner's property and money were taken in 1927. This money was taken for one purpose only, namely, to widen and improve Taylor Street. This was never done. In January, 1947, petitioner obtained a judgment for a refund. In May, 1947, nearly *five months after the judgment* was obtained, the City of Chicago commenced the improvement—over 19 years later. We submit as a matter of law that 19 years is an abandonment. Yet, petitioner was deprived of her judgment by the Appellate Court considering matters which occurred after judgment and pending an appeal. It is earnestly urged that this Court grant this petition for certiorari.

Respectfully submitted,

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Attorney for Petitioner.

APPENDIX.

Opinion of the Appellate Court About Which Petitioner Complains.

(Reported in 336 Ill. App. 126, 83 N. E. (2d) 23.)

Mr. Justice Kiley delivered the opinion of the Court:

These are five actions to recover refunds of special assessments for a street improvement in Chicago and one action for a writ of *audita querela*. The trial court entered summary judgments for the plaintiffs in the special assessment actions and the City has appealed from each judgment. The City has also appealed from the judgment dismissing its complaint for a writ of *audita querela*. The six appeals have been consolidated in this court.

Plaintiffs are owners of real estate on the south side of Taylor Street between Canal and Halsted Streets in Chicago. The City, pursuant to a street widening ordinance in 1921, condemned 20 feet of the property on the south side of Taylor Street. The condemnation judgment was entered in 1927, and in 1928 judgment for awards to the property owners and assessments against the property for benefits were confirmed. In 1924 an ordinance to pave Taylor Street was passed but later abandoned. Subsequently, another ordinance was passed for paving the street but bids for the work exceeded the estimated cost. No contract was made and the work was not done. The City expended the special assessment funds collected from the properties, plus $43,000 of other City funds, to acquire the 20 foot strip. This acquisition was completed in 1938.

Joseph Woodruff, an owner of the Taylor Street property, commenced suit to recover assessments paid by him for the Taylor Street improvement and for the

widening of Jefferson Street in Chicago. He had judgment in the trial court for the Taylor Street assessment but judgment was against him for the Jefferson Street assessment. This court reversed the judgment in his favor for the Taylor Street assessment, and affirmed the Jefferson Street judgment. *Woodruff* v. *City of Chicago*, 326 Ill. App. 577. The Supreme Court reversed the judgment of this court as to Taylor Street and affirmed the Jefferson Street judgment (394 Ill. 542). The reports of those cases may be referred to for a fuller statement of the case than we feel required to give in this opinion.

The Supreme Court judgment in the *Woodruff* case became final in November of 1946. The instant suits to recover assessments were filed between December 9, 1946 and March 7, 1947. They rested upon the decision in the *Woodruff* case. Plaintiffs claim that the Supreme Court's finding in the *Woodruff* case that the Taylor Street improvement had been abandoned by the City is binding in these cases, and that the City refused to return or use the assessments for the purposes of the improvement for which they were levied and collected and, accordingly, holds the funds as trustee.

Following the entry of the last summary judgment in the instant assessment cases, on October 30, 1947 the City filed its complaint for a writ of *audita querela* to satisfy the judgments. The ground of complaint was that since the judgments had been entered, Taylor Street had been widened, paved and the improvement completed. On plaintiffs' motion this complaint was stricken. The City elected to stand on the complaint and the complaint was dismissed.

The basic question is whether the counter affidavits of the City in the suits to recover assessments presented issues of fact on the element of abandonment. If the finding in the *Woodruff* case is binding in the instant suits, there was no question of fact and the summary judgments were proper.

The facts in the *Woodruff* case were the improvement ordinance of 1921 and the condemnation proceed-

ings thereunder; the special benefit assessments paid by Woodruff in 1928; the action of the City Council repealing the 1924 pavement ordinance; the passage of a new paving ordinance in 1927; the confirmation of the condemnation judgment in 1930; the taking of bids in August, 1930, which exceeded the estimates; the failure to collect assessments for the paving of Taylor Street; the designation of Taylor Street in 1940 as an arterial highway and the allocation of $100,000 from the Motor Fuel Tax Fund for the improvement; and the failure to use any of the fund or to prepare complete plans on which to let a contract for the work. The City defended on the ground that the improvement could not be carried out because of the economic depression and a City official testified that the City intended to complete the improvement when the opportune time came. The Supreme Court stated that the law contemplated reasonable dispatch in carrying out public improvements and that the economic depression was no excuse; that assessments are recoverable when the improvement is abandoned; and that the lack of an effective paving ordinance and lack of a fixed time for making the improvement were unmistakable indications of a lack of "present intention" to do the work. It concluded that the Taylor Street improvement had been abandoned and that since the Jefferson Street improvement was completed during the pendency of this suit, there could not be a finding that that improvement had been abandoned.

The City's counter affidavit in the *Goodman* case was filed January 22, 1947. It set out in addition to the facts recited in the *Woodruff* case that during World War II, materials for the improvement were subject to priority and were not procurable; that December 17, 1946, the City Council passed an additional appropriation of Motor Fuel Tax Funds for paving Taylor Street; that plans and specifications had been submitted to the State Highway Department for approval; and that on January 10, 1947 the City Council authorized the taking of bids. The affidavit in the *Weinheimer* case was filed February 17, 1947. It contained substantially the fore-

going facts and in addition the fact that on November 30, 1943, the War Production Board denied authority to the City to proceed with the improvement; that the Commissioner of Public Works had authorized publication of an advertisement for bids on February 15, 17, 18, 19 and 20, 1947; and that it was contemplated that the bids would be opened February 27. The counter affidavit in the *Maxwell* case was filed April 28, 1947. In addition to the foregoing facts it stated that the plans submitted to the State Highway Department had been approved, bids taken and a contract made with McDuffie, Brown & Brophy; that the contract calls for the completion of the improvement by November 1, 1947; and the contractors' bond has been filed. The counter affidavit in the *Swift* case was filed June 2, 1947. In addition to the foregoing it, and an additional affidavit, stated the additional facts that on May 20, 1947 the contractor had begun breaking vaulted sidewalks for the purpose of constructing retaining walls; and estimated that the street would be readied for paving about June 20 and would be completed November 1, 1947. In the *Collins* case a supplemental counter affidavit was filed by the City on October 3, 1947. In addition to the foregoing it stated the additional facts; that the paving had been completed and the roadway had been opened for traffic.

It is admitted in this court that the improvement was completed and open for traffic October 14, 1947. It is argued that this was after summary judgments were entered. The relation of the completion date to the judgment dates is unimportant. It is conceded that the special assessment proceeding for Taylor Street had been abandoned. The question is whether the counter affidavits raise triable issues of fact on the question of abandonment of the improvement.

We think that the counter affidavits removed these cases from the effect of the *Woodruff* case. There may be room for argument on the *Goodman* case. We cannot say, as a matter of law, however, that the intervention of the war, rendering materials unprocurable,

was not an excusable delay, or that the additional appropriation of Motor Fuel Funds and the approval of specific plans by the State Highway Department authorizing the taking of bids did not indicate "a present intention" to go ahead with the work. In the *Woodruff* case the defense of excusable delay was based on economic factors and there were no complete plans prepared for the improvement upon which a contract could be let. We think that the Supreme Court might have taken a different view of the *Woodruff* case had these additional facts been present here. *Rudin* v. *King-Richardson Co.*, 276 Ill. App. 46.

Because the special assessment proceeding for paving was abandoned, it does not follow that the money collected for the widening was not used. The City's affidavits stated that the fund collected had been used to acquire the property. Passage of time alone is not the test of abandonment of an improvement. This is clear from the cases cited by the plaintiffs. *Bradford* v. *City of Chicago*, 25 Ill. 411; *McConville* v. *City of St. Paul*, 77 N. W. (Minn.) 993; *Valentine* v. *City of St. Paul*, 26 N. W. (Minn.) 457; *City of San Antonio* v. *Peters*, 40 S. W. (Texas) 827; *District of Columbia* v. *Thompson*, 281 U. S. 25. Our view of the instant cases is not inconsistent with the views of the courts on the facts in the cases cited. Those cases are distinguishable from the instant cases for the reasons given in *Boss* v. *District of Columbia*, 134 Fed. (2d) 14.

It is not necessary for the City's affidavits to show actual work done under the contract, nor enough in itself for plaintiffs to allege that the street was in the same condition at judgment time as it was when the *Woodruff* case was decided. The City's affidavit in the *Collins* case stated that the work had commenced. It might be argued that we should take the same view as the Supreme Court of the delay prior to World War II. The answer is that the *Woodruff* case was filed before the war, whereas, here the delay caused by the war has intervened. In this connection the City points

out that before the earliest of these cases had been filed in December 1946, plans for paving Taylor Street had been approved by the State Highway Department.

It is our conclusion that the City's counter affidavits presented triable issues of fact and that the summary judgments were unwarranted. Because of this opinion it follows that we should dismiss without prejudice the appeal from the judgment dismissing the complaint for the writ of *audita querela.*

Plaintiffs presented a conditional motion in their brief that, in the event we hold *Woodruff* v. *City* not controlling, we should transfer the cause to the Supreme Court. We cannot transfer a cause after entering judgment.

Plaintiffs argue that, in any event, the judgment should be affirmed under section 13 of Article II of the Constitution of Illinois. We see no merit to this contention. Plaintiffs alleged they had not received just compensation for their property because the special assessment deducted from the awards had not been used for the purpose for which the assessment was levied. This allegation did not present a constitutional question, but a question of fact as to the use of the money. *Chapralis* v. *City of Chicago,* 389 Ill. 269. The trial court presumably found that the money had not been used for the proper purpose. We find that the court was in error in entering the summary judgment.

For the reasons given the summary judgments are reversed and the causes are remanded for a trial of the issues of fact raised by the counter affidavits of the City. The appeal from the judgment dismissing the complaint for writ of *audita querela* is dismissed, without prejudice.

The Appeal in 44381 is Dismissed, Without Prejudice. Judgments in Cases Nos. 44167, 44185, 44231, 44236 and 44380 are Reversed and the Causes Remanded.

Burke, P. J. and Lewe, J. Concur.